

HOUSE No. 734

By Mr. O’Flaherty of Chelsea, petition of Eugene L. O’Flaherty for legislation to improve the accuracy of eyewitness identification procedures in criminal investigations. The Judiciary.

The Commonwealth of Massachusetts

In the Year Two Thousand and Five.

AN ACT TO IMPROVE THE ACCURACY OF EYEWITNESS IDENTIFICATION PROCEDURES.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Legislative Findings. The General Court hereby
2 finds that a substantial number of convictions of innocent persons
3 result from erroneous eyewitness identifications. The General
4 Court further finds that adoption by law enforcement of more
5 careful and uniform procedures for conducting and documenting
6 eyewitness identifications is likely to reduce the frequency of
7 misidentification. Avoiding erroneous eyewitness identifications
8 not only serves to avoid convicting the innocent, but also allows
9 law enforcement to continue its pursuit of the guilty. To promote
10 these ends, the legislature enacts the following statute.

1 SECTION 2. The General Laws are hereby amended by
2 inserting after Chapter 276, the following new chapter:—

3 **Chapter 276A. Eyewitness Identification Procedures.**

4 Section 1. Definitions. As used in this chapter, the following
5 words shall have the following meanings, unless the context
6 clearly requires otherwise:—

7 “Filler” shall mean a person or photograph of a person included
8 in a live or a photo lineup who is not a suspect in a criminal inves-
9 tigation.

10 “Leading Question” shall mean a question fashioned in such a
11 manner as to suggest a particular answer.

12 “Lineup” shall describe the displaying of a group of individuals
13 including a suspect to an eyewitness so that the eyewitness may
14 determine whether she or he believes the suspect to be the perpe-
15 trator of the crime.

16 “Live lineup” shall refer to a lineup which consists of persons.

17 “Photo lineup” shall refer to a lineup which consists of pho-
18 tographs.

19 “Sequential lineup” shall refer to a lineup where the persons or
20 photographs are displayed to the witness one at a time, rather than
21 displayed simultaneously.

22 “Showup” shall refer to a field identification procedure in
23 which a suspect is displayed to an eyewitness so that the eyewit-
24 ness may determine whether she or he believes the suspect is the
25 perpetrator of the crime.

26 Section 2. Answering Emergency Calls.

27 An emergency call-taker or dispatcher must obtain and dissemi-
28 nate, in a nonsuggestive manner, complete and accurate informa-
29 tion from the caller. An emergency call-taker should avoid asking
30 suggestive or leading questions.

31 Section 3. Investigation of the Scene of an Incident.

32 A preliminary investigating officer shall obtain, preserve, and
33 use the maximum amount of accurate information from the scene.
34 The preliminary investigating officer shall reduce to writing the
35 names and addresses of all persons present at the scene of the
36 crime.

37 Section 4. Questioning of Witnesses at the Scene of the Inci-
38 dent. Witnesses present at the scene of the incident should be sep-
39 arated prior to being questioned. The area should be canvassed for
40 other witnesses. All witnesses should be instructed to avoid dis-
41 cussing details of the incident with other witnesses. The prelimi-
42 nary investigating officer should:

43 (i) establish rapport with the witness.

44 (ii) inquire about the witness’s condition.

45 (iii) avoid leading questions.

46 (iv) if necessary clarify information received from the witness

47 (v) document information obtained from the witness, including
48 the witness’ identity, in a written report.

49 (vi) record witness statements as close to verbatim as possible;
50 (vii) encourage the witness to contact investigators with any
51 further information.

52 (viii) instruct the witness to avoid discussing details of the inci-
53 dent with other potential witnesses.

54 The original notes of all responding and investigating officers
55 should be preserved, in addition to their formal reports.

56 Section 5. Preparation and Use of Books of Photographs of
57 Potential Suspects. Display of photographs of previously arrested
58 persons, arranged in a book format, is permitted only when a sus-
59 pect has not been determined and other reliable sources have been
60 exhausted.

61 A. Photographs included in books of potential suspects should:

62 (i) be grouped by format to ensure that no photograph unduly
63 stands out;

64 (ii) be selected so that photographs are uniform with regard to
65 general physical characteristics, including, but not limited to, race,
66 age and gender;

67 (iii) as a general matter, be grouped by specific crime;

68 (iv) be included only when positive identifying information
69 exists for all individuals whose photographs are included;

70 (v) be reasonably contemporary;

71 (vi) be selected so that no individual's photograph is included
72 more than once.

73 B. The person conducting the procedure should:

74 (i) instruct each witness in the absence of any other witnesses;

75 (ii) describe the book to the witness only as a "collection of
76 photographs";

77 (iii) instruct the witness that the person who committed the
78 crime may or may not be present in the book;

79 (iv) suggest that the witness think back to the event and her or
80 his frame of mind at the time;

81 (v) instruct the witness to select a photograph if the witness is
82 able and to state, if possible, the basis on which she or he has
83 made the identification;

84 (vi) assure the witness that regardless of whether the witness
85 makes an identification the police will continue to investigate the
86 case;

87 (vii) instruct the witness that the person conducting the proce-
88 dure is required to ask the witness to state in her or his own words
89 the level of certainty of any identification.

90 C. The person conducting the procedure should:

91 (i) document the results of the procedure in writing, including
92 the witness' own words regarding her or his level of certainty of
93 any identification made;

94 (ii) document and preserve the photographs shown to the wit-
95 ness whether or not an identification is made.

96 Section 6. Developing and Using Composite Images.

97 A. A person preparing a composite image of a perpetrator
98 should:

99 (i) assess the ability of the witness to provide a description of
100 the perpetrator;

101 (ii) select the procedure to be used from those available,
102 including, but not limited to, identikit type, artist, or computer gen-
103 erated image;

104 (iii) avoid showing the witness any photographs immediately
105 prior to development of the composite;

106 (iv) select an environment for conducting the procedure that
107 minimizes distractions.

108 (v) conduct the procedure with each witness separately.

109 B. A person preparing a composite image of a perpetrator
110 should:

111 (i) explain to each witness, in the absence of any other witness,
112 the composite technique to be used and how the composite will be
113 used in the investigation;

114 (ii) instruct the witness to think back to the event and her or his
115 frame of mind at the time;

116 (iii) determine with the witness whether the composite is a rea-
117 sonable representation of the perpetrator.

118 C. A person preparing a composite image of a perpetrator
119 should:

120 (i) document in writing the procedure employed and whether a
121 satisfactory composite was developed.

122 (ii) preserve all composites generated.

123 Section 7. Interviewing of Eyewitnesses by the Followup Inves-
124 tigator.

- 125 A. Prior to conducting the interview, the investigator should:
- 126 (i) review available information;
- 127 (ii) plan to conduct the interview as soon as the witness is phys-
- 128 ically and emotionally capable;
- 129 (iii) select an environment that minimizes distractions while
- 130 maintaining the comfort level of the witness;
- 131 (iv) ensure that resources such as an interview room, notepad,
- 132 tape recorder, camcorder and/or other useful resources are avail-
- 133 able;
- 134 (v) separate the witnesses;
- 135 (vi) determine the nature of the witness' prior law enforcement
- 136 contact, including whether the witness has a prior arrest record or
- 137 record of convictions.
- 138 B. Prior to beginning the interview, the investigator should:
- 139 (i) develop rapport with the witness;
- 140 (ii) inquire about the nature of the witness' prior law enforce-
- 141 ment contact related to the incident;
- 142 (iii) volunteer no specific information about the suspect or the
- 143 case.
- 144 C. During the interview, the investigator should:
- 145 (i) encourage the witness to volunteer information without
- 146 prompting;
- 147 (ii) encourage the witness to report all details even if they seem
- 148 trivial;
- 149 (iii) ask open-ended, general questions (e.g., "what can you tell
- 150 me about the car?") and augment with close-ended, specific ques-
- 151 tions (e.g., "what color was the car?")
- 152 (iv) avoid leading questions;
- 153 (v) caution the witness not to guess;
- 154 (vi) ask the witness to mentally recreate the circumstances of
- 155 the event;
- 156 (vii) encourage nonverbal communication such as drawings,
- 157 gestures, and use of objects;
- 158 (viii) avoid interrupting the witness;
- 159 (ix) encourage the witness to contact investigators when addi-
- 160 tional information is recalled;
- 161 (x) instruct the witness to avoid discussing details of the inci-
- 162 dent with other potential witnesses;
- 163 (xi) encourage the witness to avoid contact with the media or
- 164 exposure to media accounts concerning the incident;

165 (xii) thank the witness for her or his cooperation.

166 D. Recording Witness Recollections.

167 1. The investigator should:

168 (i) after informing the witness that the interview will be video-
169 taped, record the entire contents of the interview by videotape;

170 (ii) in circumstances in which videotaping cannot reasonably be
171 accomplished, and after informing the witness that the interview
172 will be audiotaped, record the entire contents of the interview by
173 audiotape;

174 (iii) record by videotape or audiotape the conversation in which
175 the witness is informed that the interview will be videotaped or
176 audiotaped.

177 2. In the event that video or audiotaping cannot reasonably be
178 accomplished, the investigator should record the witness' state-
179 ment in writing as close to verbatim as possible and request that
180 the witness correct any errors in the written transcription and sign
181 the written notes.

182 3. The investigator should review any written documentation
183 and inquire of the witness whether there is anything she or he
184 wishes to change, add, or emphasize. Any changes should be
185 signed by the witness.

186 E. Assessing the Accuracy of Individual Elements of a Witness'
187 Statement After conducting the interview, the investigator
188 should:

189 (i) consider each individual component of the witness' state-
190 ment separately;

191 (ii) review each element of the witness' statement in the context
192 of the entire statement and look for inconsistencies within the
193 statement;

194 (iii) review each element of the statement in the context of evi-
195 dence known to the investigator from other sources, including but
196 not limited to, other witnesses' statements and physical evidence.

197 F. Maintaining Contact with the Witness.

198 During any post-interview contact with the witness, the investi-
199 gator should:

200 (i) reestablish rapport with the witness;

201 (ii) inquire whether the witness has recalled any additional
202 information;

203 (iii) follow interviewing and documentation procedures in
204 Section 7 A-D;

- 205 (iv) provide no information from any other sources.
- 206 Section 8. Field Identification Procedures: Showups.
- 207 A. When conducting a showup, the investigator should:
- 208 (i) determine and document a description of the perpetrator
- 209 prior to the showup (ii) when possible transport the witness to the
- 210 location of the detained suspect;
- 211 (iii) when multiple witnesses are involved:
- 212 a. separate the witnesses and instruct them not to discuss the
- 213 incident with other witnesses;
- 214 b. consider using other identification procedures such as a
- 215 lineup or photo array or the remaining witnesses when a witness
- 216 has made a positive identification;
- 217 (iv) caution the witness that the person she or he is viewing my
- 218 or may not be the perpetrator;
- 219 (v) obtain and document a statement of the degree of certainty
- 220 for both identifications and nonidentifications.
- 221 B. When conducting a showup, the investigator should:
- 222 (i) document the time and location of the procedure;
- 223 (ii) record both identification and nonidentification results in
- 224 writing, including the witness' own words regarding her or his
- 225 level of certainty.
- 226 Section 9. Procedures for Eyewitness Identification of Sus-
- 227 pects:
- 228 Live Lineup.
- 229 A. In composing a live lineup, the investigator should:
- 230 (i) include only one suspect in each identification procedure;
- 231 (ii) select fillers who generally fit the witness' description of
- 232 the perpetrator;
- 233 (iii) when there is a limited or inadequate description of the
- 234 perpetrator provided by the witness or when the witness' descrip-
- 235 tion of the perpetrator differs significantly from the appearance of
- 236 the suspect, choose fillers who resemble the suspect in significant
- 237 features;
- 238 (iv) place suspects in different positions in each lineup both
- 239 across cases and with multiple witnesses in the same case
- 240 (v) position the suspect randomly unless the suspect's attorney
- 241 requests a particular position;
- 242 (vi) include a minimum of four fillers per identification proce-
- 243 dure;

244 (vii) when showing a new suspect, avoid reusing fillers in
245 lineups shown to the same witness;

246 (vii) be aware that complete uniformity of features between
247 suspects and fillers is not required;

248 (viii) avoid using fillers who so closely resemble the suspect
249 that a person familiar with the suspect might find it difficult to
250 distinguish the suspect from the fillers;

251 (ix) create a consistent appearance between the suspect and
252 fillers with respect to any unique feature, such as scars or tattoos,
253 used to describe the perpetrator by artificially adding or con-
254 cealing that feature.

255 B. Instructing the Witness Prior to Viewing a Lineup.

256 Prior to presenting a live lineup, the investigator should:

257 (i) instruct the witness that she or he will be asked to view a
258 group of individuals;

259 (ii) instruct the witness that it is just as important to clear the
260 innocent from suspicion as to identify the guilty;

261 (iii) instruct the witness that individuals in the lineup may not
262 appear exactly as they did on the date of the incident because fea-
263 tures such as head and facial hair are subject to change;

264 (iv) instruct the witness that the person who committed the
265 crime may or may not be present in the group;

266 (v) assure the witness that the police will continue to investi-
267 gate the incident regardless of whether an identification is made;

268 (vi) instruct the witness that the procedure requires the investi-
269 gator to ask the witness to state in her or his own words the level
270 of certainty of any identification.

271 C. Conducting the Live Lineup.

272 1. In order to ensure that inadvertent verbal cues or body lan-
273 guage do not influence a witness, whenever practical, considering
274 the time of day, day of the week, and other personnel conditions
275 within the agency or department, the person conducting the live
276 lineup identification procedure should be someone other than the
277 primary investigator assigned to the case. In those cases where the
278 primary investigating officer conducts the live lineup identifica-
279 tion procedure, she or he should be careful to avoid inadvertent
280 signaling to the witness of the “correct” response.

281 2. Live lineup identification procedures should be conducted
282 sequentially.

283 3. When presenting a live lineup, the lineup administrator
284 should provide the viewing instructions to the witness set forth at
285 Section 9B.

286 4. When presenting a live lineup, the lineup administrator
287 should also provide the following instructions to the witness:

- 288 (i) individuals will be viewed one at a time;
- 289 (ii) individuals will be presented in random order;
- 290 (iii) take as much time as is needed in making a decision about
291 each individual before moving to the next one;
- 292 (iv) if the person who committed the crime is present, identify
293 her or him;
- 294 (v) all individuals will be presented, even if an identification is
295 made; or the procedure will be stopped at the point of an identifi-
296 cation (consistent with jurisdictional/departmental procedures).

297 5. Begin with all lineup participants out of the view of the wit-
298 ness.

299 6. Instruct all those present at the lineup not to suggest in any
300 way the position or identity of the suspect in the lineup.

301 7. Present each individual to the witness separately, in a previ-
302 ously determined order, removing those previously shown.

303 8. Ensure that any identification actions such as speaking or
304 moving are performed by all members of the lineup.

305 9. Avoid saying anything to the witness that may influence the
306 witness' selection.

307 10. If an identification is made, avoid reporting to the witness
308 any information regarding the individual she or he has selected
309 prior to obtaining the witness' statement of certainty.

310 11. After notifying the witness that his or her statements will be
311 recorded, document any identification results and witness' state-
312 ment of certainty by video recording. When video recording
313 cannot reasonably be accomplished, document any identification
314 results and witness' statement of certainty by audio recording.

315 12. Document the lineup procedures and content in writing,
316 including:

- 317 (i) identification information of lineup participants;
- 318 (ii) names of all persons present at the lineup;
- 319 (iii) date and time the identification procedure was conducted.

320 13. Document the lineup by video. This documentation should
321 be of a quality that represents the lineup clearly and fairly. If

322 video documentation cannot reasonably be accomplished, docu-
323 ment the lineup by photo. Photo documentation can be of either
324 the group or each individual.

325 14. Instruct the witness not to discuss the identification proce-
326 dure or its results with other witnesses involved in the case and
327 discourage contact with the media.

328 Section 10. Procedures for Eyewitness Identification of Sus-
329 pects:

330 Photographic Array.

331 A. In composing a photo lineup, the investigator should:

332 (i) include only one suspect in each identification procedure;

333 (ii) select fillers who generally fit the witness' description of
334 the perpetrator;

335 (iii) when there is a limited or inadequate description of the
336 perpetrator provided by the witness, or when the witness' descrip-
337 tion of the perpetrator differs significantly from the appearance of
338 the suspect, select fillers who resemble the suspect in significant
339 features;

340 (iv) if multiple photos of the suspect are reasonably available to
341 the investigator, select a photo that resembles the suspect descrip-
342 tion or appearance at the time of the incident;

343 (v) include a minimum of five fillers per identification proce-
344 dure;

345 (vi) be aware that complete uniformity of features between sus-
346 pects and fillers is not required;

347 (vii) avoid using fillers who so closely resemble the suspect
348 that a person familiar with the suspect might find it difficult to
349 distinguish the suspect from the fillers;

350 (viii) create a consistent appearance between the suspect and
351 fillers with respect to any unique feature, such as scars or tattoos,
352 used to describe the perpetrator by artificially adding or con-
353 cealing that feature;

354 (ix) place suspects in different positions in each photo array
355 both across cases and with multiple witnesses in the same case;

356 (x) position the photo of the suspect randomly unless the sus-
357 pect's attorney requests a particular position;

358 (xi) when showing a new suspect, avoid reusing fillers in photo
359 arrays already shown to the same witness;

360 (xii) ensure that no writings or information concerning previous
361 arrests will be visible to the witness;

- 362 (xiii) view the completed spread to ensure that the suspect does
363 not unduly stand out;
- 364 (xiv) preserve the presentation order of the photo array;
- 365 (xv) preserve the photos in their original condition.
- 366 B. Instructing the Witness Prior to Viewing a Photo Lineup.
- 367 Prior to presenting a photo lineup, the investigator should:
- 368 (i) instruct the witness that she or he will be asked to view a set
369 of photographs;
- 370 (ii) instruct the witness that it is just as important to clear the
371 innocent from suspicion as to identify the guilty;
- 372 (iii) instruct the witness that individuals in the photo lineup
373 may not appear exactly as they did on the date of the incident
374 because features such as head and facial hair are subject to
375 change;
- 376 (iv) instruct the witness that the person who committed the
377 crime may or may not be present in the photographs presented;
- 378 (v) assure the witness that the police will continue to investi-
379 gate the incident regardless of whether an identification is made;
- 380 (vi) instruct the witness that the procedure requires the investi-
381 gator to ask the witness to state in her or his own words the level
382 of certainty of any identification.
- 383 C. Conducting the Photo Lineup.
- 384 1. In order to ensure that inadvertent verbal cues or body lan-
385 guage do not influence a witness, whenever practical, considering
386 the time of day, day of the week, and other personnel conditions
387 within the agency or department, the person conducting the photo
388 identification procedure should be someone other than the primary
389 investigator assigned to the case. In those cases where the primary
390 investigating officer conducts the photo identification procedure,
391 she or he should be careful to avoid inadvertent signaling to the
392 witness of the “correct” response.
- 393 2. Photo identification procedures should be conducted sequen-
394 tially.
- 395 3. When presenting the photo lineup, the lineup administrator
396 should provide the viewing instructions to the witness set forth
397 above at Section 10B.
- 398 4. When presenting a photo lineup, the lineup administrator
399 should also provide the following instructions to the witness:
- 400 (i) individual photographs will be viewed one at a time;

- 401 (ii) the photos will be presented in random order;
402 (iii) take as much time as is needed in making a decision about
403 each photo before moving to the next one;
404 (iv) all photos will be shown, even if an identification is made;
405 or the procedure will be stopped at the point of an identification
406 (consistent with jurisdictional/departmental procedures).
- 407 5. The photo lineup administrator should confirm that the wit-
408 ness understands the nature of the sequential procedure.
- 409 6. The photo lineup administrator should present each photo to
410 the witness separately, in a previously determined order, removing
411 those previously shown.
- 412 7. The photo lineup administrator should avoid saying anything
413 to the witness that may influence the witness's selection.
- 414 8. Once an identification is made, the photo lineup adminis-
415 trator should avoid reporting to the witness any information
416 regarding the individual she or he has selected prior to obtaining
417 the witness' statement of certainty.
- 418 9. After informing the witness that her or his statements will be
419 recorded, the photo lineup administrator should record any identi-
420 fication results and witness' statement of certainty either by video
421 or audio recording. When video or audio recording cannot reason-
422 ably be accomplished, the identification results and a verbatim
423 statement of certainty should be documented in writing and signed
424 by the witness.
- 425 10. The photo lineup administrator should document in writing
426 the photo lineup procedures, including:
- 427 (i) identification information and sources of all photos used;
428 (ii) names of all persons present at the photo lineup;
429 (iii) date and time of the identification procedure.
- 430 11. The photo lineup administrator should instruct the witness
431 not to discuss the identification procedure or its results with other
432 witnesses involved in the case and should discourage contact with
433 the media.
- 434 Section 11. Remedies for Noncompliance.
- 435 A. Evidence of a failure to comply with any of the provisions
436 of this statute shall be considered by the trial courts in adjudi-
437 cating motions to suppress eyewitness identification.

438 B. Evidence of a failure to comply with any of the provisions of
439 this statute shall be admissible in support of claims of eyewitness
440 misidentification so long as such evidence is otherwise admis-
441 sible.

442 C. When evidence of a failure to comply with any of the provi-
443 sions of this statute has been presented at trial, the jury shall be
444 instructed that it may consider credible evidence of noncompli-
445 ance in determining the reliability of eyewitness identifications.